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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Adoption of I.L. et al., Minors.	
M.T., Petitioner and Respondent, v. J.L., Objector and Appellant.	E062178 (Super.Ct.Nos. RIA1300160 & RIA1300161) OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Fernandez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioner and Respondent.

Objector and appellant J.L. (father), the biological father of I.L. and M.L. (the children), appeals from the juvenile court's orders (the judgment) granting petitions for freedom from parental custody and control, pursuant to Family Code section 7822,[1] thereby terminating his parental rights. Father contends the judgment must be reversed because the evidence was insufficient to establish that he left the children for one year and intended to abandon them. (§ 7822.) We affirm.

PROCEDURAL BACKGROUND

On December 12, 2013, M.T., who was married to the children's mother, A.T. (mother), filed adoption requests to adopt the children. At the time, M.L. was 13 years old and I.L. was 11 years old. Subsequently, on December 23, 2013, M.T. filed amended petitions for freedom from parental custody and control (the petitions) with regard to the children. The petitions alleged that father was convicted of 21 counts of lewd and lascivious acts with a minor under the age of 14 years (Pen. Code, § 288, subd. (a)(1)) and seven counts of committing a lewd and lascivious act with a minor aged 14 or 15 years by a perpetrator at least 10 years older (Pen. Code, § 288, subd. (c)(1)). The petitions stated that father was sentenced to 50 years eight months in state prison and would not be eligible for parole for 40 years. The petition further alleged that father had left the children in the care of M.T. and mother since May 25, 2009, without any provision for support, and without any communication, with the intent of abandoning the

[1] All further statutory references will be to the Family Code, unless otherwise noted.

children. (§ 7822.) Thus, M.T. was requesting the court to declare the children free from father's custody and control.

The probation department filed a report, which recommended that the petitions be granted, after conducting interviews with M.T., mother, the children, and father. Mother reported that she and father got married in 1998, and they had the children together. He was verbally abusive toward mother and the children. Mother filed for divorce in 2005, and the divorce was finalized in 2006. In 2009, mother's older daughter from a previous marriage reported that father had molested her from ages 6 to 9. Mother immediately obtained a restraining order against father, prohibiting contact with her and the children. Father was found guilty of numerous counts of lewd and lascivious acts with a minor.

M.T. stated that he had been an active father figure to the children for the past four years, and he wanted to adopt them. Terminating father's parental rights was the first step in doing so. I.L. said that she last saw father when she was 7 years old, and she did not think he was a good father. She said she would be happy if M.T. was her real father, and not just a stepfather. M.L. said she last saw father when she was 9 years old. She said he treated her "fine," but also did not think he was a good father.

A hearing on the petitions was held on August 14, 2014. Mother testified that she had a child support order for $750 a month, which started in 2005. Mother testified that she obtained the restraining order against father in May 2009, when he was initially arrested. Father was convicted in January 2013. Mother testified that she had not received any child support from father since before December 2012.

Father also testified at the hearing. He confirmed that child support was first ordered in October 2005 and that he currently owed $14,000 in arrears. Father said two of his employers deducted child support from his wages and sent it directly to the district attorney's office. Father testified that he had not seen his children, or had any contact with them, since May 2009, when the restraining order was obtained. The restraining order was scheduled to terminate in 2017. Father said that, prior to his arrest in May 2009, he regularly visited the children. He testified that he tried twice to have the court allow him supervised visits. He also said that he wrote the children at every holiday, birthday, and occasion, and either sent the cards to his mother's house or stored them. On cross-examination, father testified that he had not paid any child support since he was incarcerated in January 2013 and that there was a court order for his child support payments to cease while he was in custody. He testified that he was sentenced to state prison for a total of 50 years eight months, and his release was scheduled for July 29, 2055.

Following testimony, father's counsel reiterated that there was currently a suspension of the child support order. He argued that, but for the restraining order, father would have continued visiting the children. Counsel for the children argued that father was prevented from seeing his daughters due to his own criminal convictions. She also asserted that the restraining order was in place until 2017, but the children could renew it if they wished. She further noted that the children would, at some point, become adults, and they would not have any responsibility to keep in contact with father then. She

added that the children currently had no desire to see father or have any contact with him. The children's counsel asserted that father had not provided support since May 2009.

The court found that M.L. was 14 years old and I.L. was 12 years old. It then found they came within the meaning of section 7822, subdivision (a)(3), in that they had been abandoned by father for more than one year prior to the filing of the petitions. The court stated that the criminal conduct of father constituted a voluntary abandonment of the children. It added that incarceration in the state prison until 2055 constituted voluntary conduct, which amounted to abandoning his role as father to the children and leaving them without a father during the remaining years that they would be minors. The court concluded that return of custody of the children to father would be detrimental to them and that freeing them from his custody was in their best interests. The court declared the children to be free from father's custody and control, pursuant to section 7822, subdivision (a)(3). The court added that M.T. did not bring the current proceedings under section 7825 (parent convicted of a felony). However, if he had done so, it would have made the appropriate findings and freed the children from father's custody under that statute.

ANALYSIS

The Court Properly Freed the Children From Father's Custody

Father argues there was insufficient evidence to support a finding that he abandoned the children within the meaning of section 7822, subdivision (a)(3). We conclude that there was sufficient evidence to support this finding. We further conclude

there was sufficient evidence to support a finding under section 7825 that father was unfit to have future custody and control of the children, due to his felony convictions.

A. *Standard of Review*

"The decision to terminate parental rights lies in the first instance within the discretion of the juvenile court, and will not be disturbed on appeal absent an abuse of that discretion. [Citation.] . . . With respect to challenged factual findings, we will affirm 'if there is any *substantial* evidence to support the trial court's findings,' i.e., 'if the evidence is reasonable, credible and of solid value—such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence.'" (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536.)

B. *There Was Sufficient Evidence to Support a Finding Under Section 7822*

Father specifically claims the evidence was insufficient to show that he left the children or had the intent to abandon them. He asserts that he did not leave the children, but was "deprived of custody" once the restraining order was issued. In other words, he was prohibited from having contact with the children because of the restraining order. He further contends that he "paid child support to the best of his ability."

"The Family Code permits a court to declare a child under the age of 18 years to be free from the custody and control of a parent when the parent has abandoned the child. [Citation.] Abandonment occurs when a 'parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, *or* without communication from the parent, with the intent on the part of the parent to abandon the child." (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491,

500.) The "failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon." (§ 7822, subd. (b).) Case law does refer to the leaving of a child in another person's care and custody as an """"actual desertion""""" by the parent. However, it also clarifies that a parent can leave a child by voluntarily surrendering the child to another person's care and custody. (*In re Amy A.* (2005) 132 Cal.App.4th 63, 69.) "Case law consistently focuses on the voluntary nature of a parent's abandonment of the parental role rather than on *physical* desertion by the parent." (*Ibid.*)

Here, substantial evidence establishes that father voluntarily surrendered his parental obligations and that he abandoned the children. It is undisputed that father had no communication with the children and provided no child support for over one year prior to the petitions being filed. These facts give rise to a presumption that father intended to abandon the children. (§ 7822, subd. (b).) Moreover, father's claims do not rebut this presumption. The restraining order filed against him was the result of his own felonious conduct. He had the ability to refrain from criminal conduct, but he freely chose to commit sexual crimes against his stepdaughter, which ultimately led to him being restricted from contacting the children. As the court noted, father voluntarily abandoned his role as a father to his children. He should not now be able to use the restraining order to his advantage in the instant case.

Therefore, we agree with the trial court's finding and assessment that father's criminal actions constituted conduct that led to voluntary abandonment of the children. The court properly granted the petitions.

C. *There Was Substantial Evidence to Support a Finding Under Section 7825*

As the court noted, M.T. did not file the petitions pursuant to section 7825. Nonetheless, it noted that, if he had, it would have found that section 7825 applied to free the children from father's custody. "Section 7825 authorizes the termination of parental rights when a parent has been convicted of a felony the facts of which 'are of such a nature so as to prove the unfitness of the parent' to have 'future custody and control of the child.' [Citation.] In accordance with this statutory language, and the fact that the involuntary termination of parental rights is an extreme measure implicating core constitutional rights, section 7825's reach traditionally has been limited to those situations where a parent commits a heinous felony offense, often against a family member, which in and of itself demonstrates that the parent will be forever unfit to have any measure of custody of his or her children." (*In re Baby Girl M.*, *supra*, 135 Cal.App.4th at p. 1531.)

Undoubtedly, there are felonies that, without more, prove a person to be unfit to have the custody of his or her children. Committing lewd and lascivious acts with minors is one of those felonies. (See *In re Kapelis* (1957) 147 Cal.App.2d 801, 802.) Here, father molested his stepdaughter while she resided in his home. He was convicted of 21 counts of lewd and lascivious acts with a minor under the age of 14 years (Pen. Code, § 288, subd. (a)(1)) and seven counts of committing a lewd and lascivious act with a minor aged 14 or 15 years by a perpetrator at least 10 years older (Pen. Code, § 288, subd. (c)(1)). We agree with the trial court that Family Code section 7825 applied to the instant case.

In sum, there was sufficient evidence for the court to free the children from father's custody and control.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.